Nos. 372 - 373 - 374

SEP 2

CHARLES EL

In the Supreme Court of the United States

THE CITY OF CINCINNATI, a Municipal Corporation,
Petitioner,

vs.

MARGARET W. VESTER.

THE CITY OF CINCINNATI, a Municipal Corporation,
Petitioner,

vs.

JAMES S. RICHARDS and PASCHAL L. RICHARDS.

THE CITY OF CINCINNATI, a Municipal Corporation,
Petitioner,

vs.

LLEWELLYN B. REAKIRT.

BRIEF IN OPPOSITION TO THE PETITION FOR WRITS OF CERTIORARI.

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THE SCOPE OF THE CASE.

We can not agree with our opponents that this record presents the whole question of the right of excess condemnation, but feel that it only involves that right when pushed to the extent of condemning land for the purpose of reselling it for profit. The condemnation enjoined by the District Court was such an attempt on the part of the city. It was not in furtherance of the public use of the twenty-five foot strip taken to widen the street.

Judge Hickenlooper (then District, now Circuit Judge), who heard the cases on the evidence, in his opinion said (R. p. 28):

> "It is frankly conceded, I think, in argument if not in the evidence, that the purpose of this excess condemnation was the recoupment, by dealing in real estate, of a large portion of the heavy expense necessary for this project. So far as we have been able to analyze the evidence, this is the only motive or purpose of the excess condemnation, the only method in which such excess condemnation can, in the language of the constitution, be in furtherance of the public use. Not even slight suggestions are given to the Court as to the restrictions which shall be imposed in case of resale to preserve the improvement made, except and unless such restrictions may be considered as founded upon the intent to aggregate the numerous parcels so appropriated, or to consolidate into one ownership a multiplicity of individual ownerships."

Again (R. p. 31):

> "Certainly, the mere appropriation of excess for the purposes of resale at a profit is not in furtherance of the purpose of the municipal improvement here, which is the construction of a street or highway. Nor would any restrictions that might be imposed upon the resale of this property in any way affect or preserve the improvement of the street. In fact, the only suggested restrictions have been that the city might aggregate the separate parcels and thus restrict building in this vicinity to that of such size and nature as would improve the entire locality and benefit the community as a whole. This is not a restriction in support of or connected with or in any way preserving the improvement of Fifth Street."

And finally (R. p. 33):

> "On the whole, we are unable to believe that the only possible ground for this excess condemnation which is disclosed or even suggested in the present

> cases, that is, the dealing in real estate for profit, bears any such close connection with the improvement or constitutes such a public use as would justify this excess condemnation."

The broad question of excess condemnation generally is not, therefore, essentially involved in this case; only the alleged right to take property for resale at a profit; that is to say, for speculation.

Both of the lower courts expressly recognize in their opinions that there may be a proper field and scope for excess condemnation. The District Court pointed out (R. p. 27) that the Legislature of Ohio has incorporated in the General Code of the State, Section 3677-12, the right on the part of municipalities to condemn excess property for the protection of public buildings and their environs, to preserve the view, appearance, light, air, and usefulness of public grounds occupied by such buildings and esplanades and parkways leading thereto. This was so even before the constitutional amendment.

The Court of Appeals, in its opinion (R. p. 108), 33 Fed. (2nd) 242, says:

> "We do not hold that the provision of the state constitution might not be validly enforced in a proper case, but that as applied by the city in these cases it violates the 'due process of law' clause of the constitution."

Therefore the opinions of the courts below have not, as claimed, rendered the Ohio constitutional amendment ineffective, or made impossible the application of that principle in the various states which have like amendments, but have only confined the application thereof to cases in which the excess taken is in some substantial degree really and genuinely to be used or restricted in furtherance of the primary purpose of the main appropriation.

In the same resolution by which the city condemned the twenty-five foot strip for the widening of Fifth Street it

undertook to appropriate certain irregular additional areas, near but not always adjacent to this strip, which were stated in the resolution to be "in excess of that actually to be occupied by said improvement." These included the tracts in question. No statement of the use to be made of these areas was made, either in the ordinance or in the petition to assess compensation although the statute requires:

> "When it is deemed necessary to appropriate property, council shall pass a resolution, declaring such intent, *defining the purpose of the appropriation*, setting forth a pertinent description of the land," etc. *G. C. Sec.* 3679,

the city contenting itself with the bare assertion that they were wanted "for the more complete enjoyment and preservation of the benefits to accrue from the taking of the twenty-five foot strip," but by what usage, how or why, was not stated. Later, however, by its answer filed in these cases (R. 10), the city alleged the use to be made of the excess property in the following language:

> "1st. That the city will be able to further the appropriate development of the south side of Fifth Street, between Main and Pike Streets, by using or disposing of its excess in tracts of such size and nature and with such restrictions as will inure to the public advantage.
>
> "2nd. That the increase in value of plaintiff's property and other properties which may accrue by reason of the improvement contemplated by the city will pay in part the very heavy expense to which the city will be put in effecting the improvement."

The first is in the alternative, vague and indefinite and really states no purpose whatever. On the evidence and statements of counsel in argument the District Court found the second of the above allegations to represent the real, essential purpose of the appropriation. In short, it was

proposed to take and resell this property at such a price as would help the city pay for the taking and paving of the twenty-five foot strip.

This finding and conclusion is reinforced by the facts concerning the financial situation of this project. The city has not the available funds with which to pay for this property. The total found available for the improvement is $1,600,000 and the city's estimate of the expense of the twenty-five foot strip alone runs as high as $2,000,000, to which must be added the cost of paving. The estimate of the cost of the *excess* condemnation is from three and one-half to five millions of dollars. (R. p. 81.) The city can not pay for the excess lands by issuing bonds because the only bonds which can be issued under the constitutional provision in question (Article XVIII, Sec. 10), are bonds secured merely by a lien upon the property condemned and not general obligations of the city, either as to principal or interest. Of course, such bonds would not be saleable. Therefore the city has no fund available for the excess condemnation. The only way in which it could accomplish its object is by what it calls "recoupment," which is mere euphemism for profit made upon the taking and reselling of respondents' lands. This resale would probably be attempted within the period of the city's option. By that we mean the six months' period after the award of the jury which the city has, under the laws of Ohio (General Code Section 3697), in which to elect whether it will accept the property, or any parcel thereof, at the jury's appraisement or not. If the award prove too high for the market, the city will be at liberty to dismiss the case at its costs, paying counsel fees, and condemn again or drop the affair altogether.

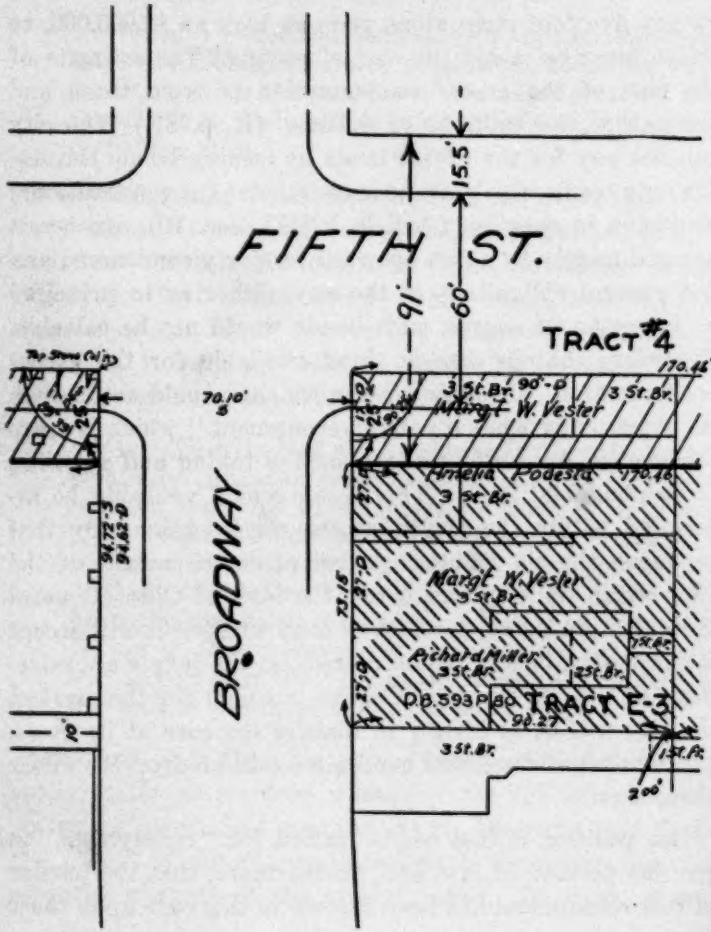
Our position is that condemnation for "recoupment" is not due process of law, and, furthermore, that the burden of this recoupment has been thrown in this case upon these

particular respondents with such unjust discrimination, compared with others similarly situated, as to deprive them of the equal protection of the laws.

We invite the Court's attention briefly to the facts concerning respondents' properties so proposed to be taken as such excess.

RESPONDENTS' PROPERTIES.

Mrs. Vester's Case.



Mrs. Vester owns a house and lot fronting 27 feet on the east side of Broadway. No part of it is within the twenty-five foot strip. It lies 44 feet south of Fifth Street and therefore 19 feet south of the south line of the proposed improvement. The house is a good brick of three stories well in keeping with the general neighborhood, an entirely lawful structure offering no impediment whatever to the complete enjoyment and use by the city of its twenty-five foot strip. It is occupied by Mrs. Vester's son, a physician and surgeon, who desires to remain in the property.* (R. 12.)

Mr. Reakirt's Case.

Mr. Reakirt owns a vacant tract of land, comprising several lots, at the southwest corner of Fifth and Sycamore Streets, fronting about 140 feet on Fifth Street and 150 feet on Sycamore Street. It is used for the time being as a parking lot with a small temporary oil filling station near the corner. It is very valuable, being under lease with a privilege of purchase that may be exercised only during the years 1955 and 1956 at $600,000.

The lessees were about to erect a handsome fifteen story building upon it, in keeping with all that is best in the city and conforming to the proposed street line, when the city passed its resolution to appropriate the entire property as "excess." The tract is level and not needed by the city for any physical reason in connection with the widening of Fifth Street, such as sustaining a slope or for drainage. The twenty-five foot strip would constitute one-sixth

* To avoid confusion, it may be stated that Mrs. Vester also owns the corner of Fifth and Broadway, where her husband conducts a drug store, which is within the twenty-five foot strip and no objection is made to the appropriation of that property. Between the two Vester properties is a parcel owned by another person.

only of the property, the excess comprising five-sixths of the whole.

The city has never been able to point out a single reason for its attempted taking of the five-sixths except its desire to speculate on the increased value thereof expected to fol-

low the widening of Fifth Street and the forceful aggregation of this tract with several others also condemned as excess.

The Richards Case.

The Richards brothers, James and Paschal, own a leasehold with privilege of purchase upon a well improved lot running through from Fifth Street to Buchanan Street, near Pike Street. The city proposes to take not only the front 25 feet, but the remaining 75 feet to the street in the rear.

INEQUALITY OF BURDEN.

The city has not been impartial in this excess condemnation, but, on the contrary, has exercised the discrimination of a speculator, as in this instance it is, selecting what it thinks it can sell at a profit when it has aggregated the holdings of the respondents and others. Thus, the property adjacent to Mr. Reakirt's is taken only to the depth of 100 feet, but Mr. Reakirt's property, being perhaps the most valuable vacant lot in the heart of the city at this time, is taken to its full depth of 150 feet.

The John Van Range Company building * fronts on Fifth Street and runs southwardly a hundred feet along Broadway just opposite Mrs. Vester's property. The front portion to a depth of 25 feet only of this building is to be taken, the remainder to be left standing; but Mrs. Vester is asked to surrender her property on Broadway directly opposite to the remnant of that building which will remain in private ownership. Indeed, as far as the physical situation is concerned, there might be some reason to take the entirety of the Range Company building because it will

* This building is owned but not used by the Cincinnati Masonic Temple Company. It is no part of the Masonic Temple building and apparently there is no intention to make it so because it is offered for lease for a long term and to be remodeled to suit tenants. (R. 12.)

be divided, whereas Mrs. Vester's property is an entirely independent parcel wholly outside the lines of the improvement, as has been said.

No property on the north side of Fifth Street is taken for purposes of "recoupment," although that will benefit equally by the widening. The "recoupment" is laid entirely upon selected parcels on the south side of the street. The Masonic Temple building, and the Fontbonne building, owned by the congregation of the Sisters of St. Joseph of New Orleans, adjacent to the twenty-five foot strip, are not condemned as excess, but the twenty-five foot strip in front of each of these buildings is condemned and is to be paid for.

Thus it will be seen that not only are the respondents' properties to be taken for the purposes of "recoupment" or speculation, but they are taken with unjust discrimination and the owners are thus deprived of equal protection.

It is said in the petitioner's brief that this improvement is part of a general scheme to improve the access to certain suburbs by street widening and the construction of a viaduct, all of which only goes to show that it would be a matter of convenience and pleasure to those so served, and a relief to taxpayers of the city at large, if a considerable part of the cost thereof could be obtained by appropriating and reselling the property of the respondents.

Petitioners allege in their brief that excess condemnation has been put into effect in certain cities in New York. This is not in the record and we do not know. It is not improbable that an examination of those instances, were they in the record, would show that the use of or restrictions to be placed upon the excess condemned had some real relation to the primary improvement other than mere speculation to pay its cost.

OUR PROPOSITIONS OF LAW ARE AS FOLLOWS:

Jurisdictional and Preliminary Questions.

1. *In Ohio a municipal condemnation case is merely an appraisal in which neither answer denying the right of condemnation, nor cross-petition, is permissible and injunction is the only remedy.*

P. C. C. and St. L. R. R. v. *Greenville*, 69 O. S. 497.
Sargeant v. *City of Cincinnati*, 110 O. S. 444.
State v. *Eastman*, 118 O. S. 121.

2. *An attempted condemnation for a non-public use deprives the citizen of his property without due process of law contrary to the Fourteenth Amendment and may be enjoined.*

Fallbrook v. *Bradley*, 164 U. S. 158.
Cavanaugh v. *Looney*, 248 U. S. 453.
Lewis on Eminent Domain, 3rd Ed., Sec. 315.

3. *Such appropriation may be enjoined under the Federal Constitution even though the state has attempted to authorize it by constitutional amendment.*

Re: *Tuthill*, 163 N. Y. 133, 49 L. R. A. 781 (1900).

4. *The Fourteenth Amendment protects against actions by a municipal corporation acting under power conferred by the state.*

The Home Telephone & Telegraph Co. v. *Los Angeles*, 227 U. S., p. 278, Syl. 5.

5. *Section 266, Judicial Code, denying right of injunction to stay proceedings in state court, does not apply because:*

The injunction here is not to enjoin the proceedings in the state court, but to enjoin the appropriation, which is primarily by ordinance, consummated by appraisal, payment and possession; also, because the proceedings in the state court are repugnant to the Constitution of the United States.

Wells-Fargo v. *Taylor*, 254 U. S. 175, 183.
Smith v. *Apple*, 264 U. S. 274, 279.

The Main Question.

6. *Excess condemnation, as here presented, is a taking not for public use and unconstitutional.*

This has been so held by every Court before which the question has come.

Re: *Tuthill, supra.*
The Albany Street Extension, 11 Wendell 148.
Bennett v. *Boyle*, 40 Barbour 551.
Opinions of the Justices, 204 Mass. 607.
Opinions of the Justices, 204 Mass. 616.
Pennsylvania Mutual Life Ins. Co. v. *Philadelphia*, 242 Pa. St. 47 (1913).
City of Richmond v. *Carneal*, 129 Va. 388, 14 L. R. A. 1341.

It is true that except for the instant case these holdings have been by state courts under state constitutional provisions against taking without due process, but certainly the Fourteenth Amendment is no weaker than the state constitutions in this regard.

Re: *Tuthill, supra.* This case is interesting as an illustration of a state constitutional amendment authorizing a taking for a non-public use held violative of the Fourteenth Amendment.

The Albany Street Extension case, supra, held unconstitutional and void a portion of an act authorizing the appro-

priation of the whole of a lot when only part is required for the use of a street. The attempt was to take off of Trinity Church yard a strip in addition to that necessary for the purpose of widening Albany Street.

Bennett v. *Boyle, supra,* held the City Commissioners limited and restrained to the lines of the avenue as enlarged on the principle that the law of eminent domain extends only to lands needed for public use and no further.

In the *Opinions of the Justices,* two cases (*supra*), the Supreme Court of Massachusetts considered questions similar to those here involved, concluding as follows:

> "1. It is not within the power of the Legislature, in connection with the widening of a highway or the laying of a new highway in the city of Boston, to authorize that city to take by right of eminent domain real estate in excess of those parcels which in whole or in part are necessary for the highway itself, with a view to the subsequent sale by the city of such excess of real estate at its full value subject to conditions or restrictions designed to promote the commercial and industrial welfare or growth of the municipality by insuring an opportunity for the construction along such highway of buildings adapted to the requirements of commerce, trade and industry and especially to the requirements of those forms of business which to a large extent employ teaming, thereby relieving or helping to prevent the increase of congestion of traffic and so facilitating the transportation of freight and passengers through the section of the city in which such highway is widened or laid out."

In *Pennsylvania Mutual Life Insurance Company* v. *Philadelphia, supra,* it was held that:

> "1. The constitutional provision permitting the appropriation of private property for public use, contemplates an actual use by the public or the vesting of the right of such use in the public; the fact that the

public may derive benefit, utility or advantage from the taking of land will not constitute public use within the meaning of the constitution, where it is not intended that the public shall use and enjoy the land appropriated."

"3. The act authorizing cities to acquire land for parks, parkways and playgrounds, and to appropriate neighboring private property within 200 feet of the boundary line of such property so taken, and to resell such neighboring property under such restrictions in the deeds as will fully protect such parks, parkways, etc., and declaring such appropriation to be a taking for public use, is unconstitutional in so far as it authorizes cities to take and appropriate private property within 200 feet of the boundary line of property appropriated for such parks, etc., as the use to which such property so taken is intended by the act to be put is not a public use."

We call special attention to *City of Richmond* v. *Carneal* (*supra*), in which it was held:

"1. The legislature cannot authorize an exercise of the power of eminent domain for the construction of a highway, which will include in the taking land outside the limits of the highway, to be replatted and sold.

"What constitutes a public use within the power to exercise eminent domain is a judicial question."

The Court at page 393 say:

"What is here proposed is to condemn land not needed for the street, replat it and sell it to others, presumably at a profit as no reason is assigned for the excess condemnation, except that the city council is of the opinion 'that not to acquire all, or parts of the property on certain blocks, squares or lots, through which the said proposed street will pass, would render it impracticable, without extraordinary expense, to

make proposed improvement.' The lot owners are no more concerned than other tax payers of the city with the cost of opening the street, but they have the right to insist that their property shall not be taken from them and sold at a profit, either to pay or to reduce the expense of opening the street. Such a transaction may be good financing on the city, and greatly to its benefit, but such use of public property is not a public use. 'Public use' and 'public benefit' are not synonymous terms."

And at page 398:

"Different courts sometimes arrive at different conclusions upon the same state of facts; but, whenever the remedy is applied, it should always be because there is a direct 'public use' of the property taken, and not a mere incidental or direct public benefit."

Cooley on Constitutional Limitations, 8th ed., Vol. II, page 1129, states the matter thus:

"The public use implies a possession, occupation and enjoyment of the land by the public at large, or by public agencies; and the due protection to the rights of private property will preclude the government from seizing it in the hands of the owners, and turning it over to another on vague grounds of public benefit to spring from a more profitable use to which the latter may devote it."

We therefore submit, as the trial judge said, the decisions upon the subject of excess condemnation are practically uniform and one way. It has thus far met with rejection as contrary to due process.

Numerous state constitutions are said to have authorized it. In several cases they will be found to restrict the lien of the bonds issued to the land taken, as in Ohio, and as no one lends one hundred percent on land, certainly not at a

jury valuation, the scheme has proved for the most part unworkable. This is the first attempt in Ohio, so far as we know, although the amendment was adopted sixteen years ago. No cases under these constitutional amendments have found their way into the libraries and we believe there are none.

A constitutional amendment in Ohio is merely the expression of a bare majority of the voters. It takes no more votes to amend the Constitution at an election than it does to amend a statute. Certainly the majority in a state can not dispense with due process. To prevent that, the Fourteenth Amendment was adopted.

7. *The question of public use is ultimately a judicial question.*

Rindge Co. v. *Los Angeles County,* 262 U. S. 700.

8. *Arbitrary and unequal classification denies the equal protection of the laws contrary to the Fourteenth Amendment.*

This condemnation attempts to recoup the cost of the improvement by taking and selling the lands of some and not of others similarly situated. If condemnation for recoupment is permissible, certainly it ought to be laid upon all lands similarly situated with regard to the anticipated benefits of the improvement.

Gast Realty Co. v. *Schneider Granite Co.,* 240 U. S. 55.

9. *The theory of remnants does not apply to the parcels in question.*

While the theory of remnants may be invoked under certain circumstances to justify the taking of more land than is actually necessary to the improvement, that is only so where the parcels remaining are so small and of so little use by themselves as to render them practically valueless. In such

case the condemning and putting together several small or irregular parcels abutting on the improvement to make one lot of practical size may, perhaps, be justified. But plainly this theory does not apply here.

Again we refer to the *"Opinions of the Justices,"* in 204 Mass. at page 619, where it is said:

> "While it is plain that a city or town cannot take land outside of a public work for speculative purposes, we can conceive of a remnant of an estate, a part of which is necessarily taken, which remnant is so small, or of such shape and of so little value that the taking of it in the interest of economy or utility, or in some other public interest, may be fairly incidental and reasonably necessary, in connection with the taking of land for the public work. But this principle is not applicable to a taking for the larger purposes stated in the question before us."

In the Richards case only one-fourth of the total property sought to be condemned is needed for the improvement; in the Reakirt case one-sixth; and in the Vester case none of the property is to be used for the improvement. Consequently these takings cannot be justified on the theory that only a remnant will be left after the improvement has been made.

OUR OPPONENTS' CITATIONS.

Of these the District Court said: (R. 32.)

> "The Court is very strongly impressed with the fact that the decisions upon the subject of excess condemnation are practically uniform and one way. * * * There are no decisions cited to the Court precisely to the contrary, all authorities cited by the defendant being in the nature of persuasive authority or argumentative development of the contentions of the defendant."

In discussing the question of public use, our opponents have brought forward the outpost cases, but have been unable to cite any case in which the taking of property for purposes of resale at a profit has been upheld by any court. In *Clark* v. *Nash*, 198 U. S. 361, there was a public purpose in the development of the entire surrounding community. The same principle seems to underlie *Strickley* v. *Highland Boy Gold Mining Co.*, 200 U. S. 527. *Old Dominion Land Co.* v. *United States*, 269 U. S. 655, was not at all a condemnation for "recoupment," as that term is used in the present record, or for the acquisition of property to be resold at a profit, but merely for the acquiring of the title to land upon which the Government had, during the war, spent a large sum of money for the construction of warehouses.

In *Hairston* v. *Danville & Western Railway Co.*, 208 U. S. 598, the highest Court of the State had already held that the condemnation was authorized by the Constitution and laws of the State and for a public use (608). This finding was held to be fully warranted by the evidence, as the proposed spur track there in question was designed to be used, not only for access to the particular factory, but for the storage of cars to be laden and unladen by receivers and shippers of freight and to relieve the congestion of business which had overburdened the trackage of the railroad; in other words, to get terminal facilities, as well as to reach the plant of the Tobacco Company.

United States v. *Gettysburg Electric Railway Company*, 160 U. S. 668, involved the right of the Government to found the Gettysburg Battle Park and condemn land for that purpose. That appropriation certainly finds no analogy to the taking of private property for speculative purposes.

In *Attorney General* v. *Williams*, 174 Mass. 476, the limitation of the height of public buildings on Copley Square bore a very distinct relation to the public interest in the use and beautification of the park.

Higginson v. *Nahant*, 11 Allen 530, upheld the condemnation of a roadway to a place of natural beauty and scenic interest, upon a basis similar to that of the last two cases.

Of these cases our opponents say, "they cannot be explained on the ground of use by the public"; but it seems to us that the Gettysburg Battle Park, the protection of Copley Square and the roadway to the point of scenic interest are all essentially for public use.

Our opponents do attempt to meet the point squarely when they say: (P. 26)

> "The recoupment of a part of the expense of the general improvement is a benefit that is entirely public in its nature. If such a result obtains, every taxpayer in the city of Cincinnati will derive a direct financial benefit over a period of many years through the decreased cost of the improvement."

This is merely an assertion that the taking, aggregation and resale of the lands of a few of the tax payers in the community will benefit the others and that such a benefit is the "public use" meant in the settled canon limiting the power of eminent domain. We think this is not so. If it is, then the taking of property for speculative purposes may constitutionally be the primary purpose of a condemnation. It would be unnecessary to hitch it on to a street improvement or other condemnation for an old-fashioned public use; it could stand independently by itself. If making profit by reselling is really a public use, it needs no other public use to sustain it.

If this condemnation were for the purpose of actually protecting or bettering the primary improvement, as by supplying light, air or view, support or drainage, another case would be presented. No such purpose is stated or claimed. But resale for revenue or even for the inducing of

the construction of more handsome and costly buildings is not, we submit, in furtherance of the public use of widening a street.

If the city's contention be correct, it may by widening a street a matter of ten feet or so, take the entire block and resell it to another. Established places of business and residences may be taken at their real estate values and their owners forced to see them pass into the hands of others at public or private sale. Perhaps the former owner might repurchase. He could not decently be refused the opportunity. And if so, the net result would be to lay upon him the financial burden of any increase or profit which would go toward the cost of the improvement and thus he would bear an impost determined by no uniform rule common to others similarly situated.

The evils resulting from such a situation are not imaginary but are present in this case. The owners of the Reakirt tract desire to improve it handsomely. It is already subject to the restrictions of the building codes of the State and City and also to the zoning ordinances. The proposed structure is entirely in keeping with the location. The owner and lessees are quite willing to surrender to condemnation the twenty-five foot strip needed for the street but their title to the residue being five-sixths of the whole is now to be subjected against their will to the city's option to take it over and resell it at a profit to others who will, so far as can be seen, put it to no better purpose than that which they themselves propose. If this be possible, certainly it can no longer be said that private property is inviolate, subject only to be taken for *public use*.

Our opponents assert that the theory of the zoning cases supports excess condemnation and cite *Euclid* v. *Ambler Realty Co.*, 272 U. S. 365, and *Gorieb* v. *Fox*, 274 U. S. 603.

Those ordinances are, we submit, distinguishable as regulations of the right to use property, rigorous it is true, based upon reasonable classifications, and falling equally upon all similarly situated. Being within the police power and having relation to public health, safety, morals or general welfare, they constitute regulations of conduct in the use of property and are, of course, not in any sense a taking of the property itself; otherwise compensation would be required. They therefore bear no true analogy to the case at bar. Any restriction within the broad limits of the zoning powers can be imposed upon the respondents in the use of their property on the south side of Fifth Street. It is not of this that they complain. What they complain of is the ruthless taking of their property and selling it to somebody else.

It is now sought to justify this appropriation upon the theory that there may be some possible restrictions put upon the land when it is resold. It has been above pointed out that the Ohio statute requires that the purpose of the condemnation be specifically stated in the appropriating resolution and that no restrictions were stated therein. The use to be made of the property was left to surmise until the trial of the present case when it appeared from the evidence and statements of counsel to the satisfaction of the trial court that the purpose was "recoupment" or speculation. Certainly property can not be taken for an unascertained purpose and its use left to future determination. That is the first of the alternative grounds for this appropriation claimed in the answer. The second, the real ground, is speculation. We submit that neither is sound and that the Court of Appeals was right in so holding.

Respectfully submitted,

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